

**TRIBAL RESERVED FISHING RIGHTS AND WATER QUALITY STANDARDS  
BRIEFING FOR MATT LEOPOLD: KEY ISSUES  
APRIL XX, 2018**

**OUTLINE OF BRIEFING:**

- **CHRONOLOGY OF EPA’S DECISIONS ON INDIAN TREATY RIGHTS AND WQS**
- **DOI’S 2015 LEGAL OPINION**
  - **OVERVIEW OF OPINION**
  - **IMPLICATIONS FOR ANY CHANGE**
- **TREATY FISHING RIGHTS IN WA/ID**
- **CWA ELEMENTS OF EPA’S DECISIONS**
- **STATUS OF WQS MATTERS IN ME, WA, AND ID**

**CHRONOLOGY OF EPA’S CONSIDERATION OF INDIAN TREATY RIGHTS AND WQS**

- **Open Question:** **Ex.5 DPP / ACP / AWP**

**Ex.5 DPP / ACP / AWP**

- **2013:** Maine sues EPA to compel action on the state’s WQS as they apply to tribal waters in Maine. EPA agrees that the Maine Indian settlement acts grant the state authority to apply state WQS to waters in the tribes’ reservations and trust lands in Maine. The acts also reserve to the tribes the right to take fish for their “individual sustenance” in their reservations and trust lands. This suit raises the open question most acutely, with state WQS applying to the core of Indian country in Maine.
- **2014:** Tribes nationwide, and especially in Maine, repeatedly press EPA to address the open question at NTOC meetings and in Regional consultations. Administrator McCarthy issues a memorandum acknowledging that EPA must ensure that its actions do not conflict with tribal treaty rights.
- **2015 IN MAINE:** In response to Maine’s suit, EPA commits to the District Court to act by January 2015. On February 2, 2015, EPA approved most of Maine’s WQS as they apply to tribal waters and also approved a designated use in the tribal waters for sustenance fishing. EPA disapproves those state human health criteria that are derived using a fish consumption rate that is not representative of tribal sustenance consumption. This is the first action on the record articulating EPA’s approach to reserved tribal rights and state WQS review.
- **2015 IN WASHINGTON:** EPA proposes federal toxics human health criteria in Washington that apply to the tribes’ subsistence fishing right in ceded territories across the state.
- **2015 IN IDAHO:** EPA submits several comment letters to the state outlining concerns about the state’s proposed WQS based on the framework articulated in the Maine decision and Washington proposal.

**DEPARTMENT OF INTERIOR’S 2015 LEGAL OPINION**

- **OVERVIEW OF OPINION**
  - As part of EPA’s review of Maine’s proposal to implement WQS in tribal waters,

EPA sought an opinion from DOI's Office of the Solicitor (DOI Opinion). EPA specifically asked for DOI's counsel on the nature and extent of tribal fishing rights and the relationship between such rights and water quality.

- DOI concluded that all four tribes in Maine have "federally-protected tribal fishing rights." The source of the fishing rights and the extent of permissible state regulation of such rights varies from tribe to tribe.
- DOI provided a survey of case law in which courts held tribal fishing rights to encompass subsidiary rights necessary to render the rights meaningful. Based on this analysis, DOI concluded that "fundamental, long-standing tenets of federal Indian law support the interpretation of tribal fishing rights to include the right to sufficient water quality to effectuate the fishing right."
- DOI concluded that the fishing rights of the tribes in Maine "would be rendered meaningless if they did not also imply a right to water quality of a sufficient level to keep the fish edible so that tribal members can safely take the fish for the sustenance."

- **IMPLICATIONS FOR ANY CHANGE**

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<sup>1</sup> Idaho Department of Environmental Quality, Rulemaking and Public Comment Summary, pg 19 (Dec. 2015).

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**TREATY FISHING RIGHTS IN WA/ID**

- There are eight Stevens-Palmer Treaties (“Stevens Treaties”) relevant to the State of Washington through which 24 tribes reserved for themselves identical or nearly identical fishing rights within the boundaries of present-day Washington. Two Idaho tribes reserved identical or nearly identical fishing rights through Stevens Treaties. The Stevens Treaties apply to the majority of waters under the jurisdiction of the State of Washington and to waters in Northern Idaho.<sup>2</sup>
- The Stevens Treaties provide “[t]he right of taking fish, at all usual and accustomed grounds and stations . . . In common with all citizens of the territory.” The right to take fish at usual and accustomed places extends to lands formerly ceded by the tribes to the U.S. as described in the treaties, as well as to all places beyond the boundaries of the ceded territories that tribal members regularly used at treaty time.<sup>3</sup>
- The Supreme Court has affirmed that the Stevens Treaties guarantee the following to tribal members: Access to usual and accustomed fishing areas (including the right to cross private land);<sup>4</sup> freedom from some state fishing regulations;<sup>5</sup> and fair share of the harvest, including hatchery fish.<sup>6</sup>
- The parties to the treaties all recognized the importance of the fishing right for the tribes’ subsistence, ceremonial, as well as commercial purposes. Relevant case law, including Supreme Court precedent, confirms that this treaty-reserved right to take fish includes the right to take fish for subsistence purposes.<sup>7</sup>

**CWA ELEMENTS OF EPA’S DECISIONS**

- **APPROACH TO SETTING WQS GENERALLY**
  - CWA section 101(a)(2) establishes as a national goal “water quality which provides for the protection and propagation of fish, shellfish, and wildlife, and recreation in and on the water, wherever attainable.” These are commonly referred to as the

<sup>2</sup> Another tribe reserved fishing rights in Southern Idaho under a different treaty. That tribe has expressed concerns with EPA relying on its treaty rights, due in part to the difference in their treaty fishing as compared to the Stevens Treaty tribes.

<sup>3</sup> See *Seufert Bros. Co. v. U.S.*, 249 U.S. 194, 199 (1919).

<sup>4</sup> *U.S. v. Winans*, 198 U.S. 371, 381-82 (1905).

<sup>5</sup> *Puyallup Tribe v. Dep’t of Game of Washington*, 391 U.S. 392, 399 (1968).

<sup>6</sup> *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 685 (1979); *United States v. Washington*, 759 F.2d 1353, 1358–60 (9th Cir. 1985) (en banc).

<sup>7</sup> See e.g., *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 678-679 (1979) (Because the Indians had always exercised the right to meet their subsistence and commercial needs by taking fish from treaty area waters, they would be unlikely to perceive a “reservation” of that right as merely the chance, shared with millions of other citizens, occasionally to dip their nets into the territorial waters. Moreover, the phrasing of the clause quite clearly avoids placing each individual Indian on an equal footing with each individual citizen of the State.”); *U.S. v. Washington*, 2016 U.S. App. LEXIS 11709 at \*28 (Observing that to the Tribes, the Stevens Treaties’ “principal purpose was to secure a means of supporting themselves once the Treaties took effect,” and to that end, “[s]almon were a central concern.”).

- “fishable/swimmable” goals of the CWA.
  - EPA interprets “fishable” uses to include, at a minimum, designated uses providing for the protection of aquatic communities and human health related to consumption of fish and shellfish.<sup>8</sup>
  - CWA section 303(c)(2)(A) provides new and revised standards “shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act.”
  - EPA regulations require that in designating uses and appropriate criteria, states shall take into consideration the water quality standards of downstream waters and “shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters.” 40 CFR 131.10(b).
  - States must submit standards to EPA for review and EPA reviews the standards and approves them if they meet the requirements of the CWA and EPA’s implementing regulations. CWA § 303(c)(3).
  - Under CWA section 304(a), EPA periodically publishes criteria recommendations for states to consider when adopting water quality criteria to meet the CWA section 101(a)(2) goals. EPA’s 2000 Methodology for Deriving Ambient Water Quality Criteria for Protection of Human Health provided EPA’s recommendations and guidance on many key issues such as selecting target populations, fish consumption rates, cancer risk levels and other important inputs in deriving protective criteria.
- **HARMONIZATION WITH OTHER FEDERAL LAWS:** The constitution places treaties and statutes on “equal legal footing,”<sup>9</sup> and the provisions of federal statutes should generally be read in harmony with treaties. In addition, CWA section 511 provides that the Act “shall not be construed as . . . affecting or impairing the provisions of any treaty of the United States.” CWA section 303, as well as EPA’s implementing regulations, are written broadly enough to allow EPA to consider other laws when taking actions with respect to WQS.<sup>10</sup> Via the steps laid out below, EPA thus harmonized its review of WQS to avoid conflicts with the federal statutes and treaties discussed above.
- **DESIGNATED USES**
  - EPA regulations provide that each state “must specify appropriate water uses to be achieved and protected.” 40 CFR 131.10(a). Wherever attainable, designated uses are to include the CWA section 101(a)(2) goals that water quality “provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in or on the water.” (Often referred to as “fishable/swimmable” uses.) EPA’s actions in Maine and Washington began with review of the states’ designated uses.
  - In **Maine**, EPA’s February 2, 2015 decision included two designated use approvals for

<sup>8</sup> USEPA. 2000. Memorandum #WQSP-00-03.

<sup>9</sup> *Owner-Operator Indep. Drivers Ass’n, Inc. v. U.S. Dept. of Transp.*, 724 F.3d 230, 234-35 (D.C. Cir. 2014) (“The Constitution places treaties and federal statutes on equal legal footing- both are ‘the supreme Law of the Land.’”).

<sup>10</sup> See *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 664 (2007) (acknowledging EPA’s duty to harmonize CWA and Endangered Species Act to give effect to both statutes where the Agency has discretion to do so); see also *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (“When there are two acts upon the same subject, the rule is to give effect to both if possible.”).

waters in Indian lands. First, EPA approved section 6207(4) of the Maine Implementing Act, that includes a tribal right of sustenance fishing in the reservation waters of the Southern Tribes, as a designated sustenance fishing use for those waters.<sup>11</sup>

- Second, EPA approved Maine's general "fishing" use as it applies to waters in Indian lands, to include a "sustenance" fishing use in those waters. EPA made its decision based on reconciling or harmonizing two statutory frameworks -- the CWA and Settlement Acts -- by interpreting the state's general "fishing" designated use to include the concept of sustenance fishing as provided for in the Settlement Acts.<sup>12</sup>
- In **Washington**, EPA had previously approved the state's fish and shellfish harvesting designated uses for all state waters. In its rulemaking promulgating HHC for Washington, EPA explained that it "interpreted the state's EPA-approved designated fish and shellfish harvesting to include or encompass a subsistence fishing component based on, and consistent with, the rights reserved to the tribes through the treaties." EPA concluded that "the tribes' ability to take fish for their subsistence purposes under the treaties would be substantially affected or impaired if it were not supported by water quality sufficient under the CWA to ensure that tribal members can safely eat the fish for their own subsistence."<sup>13</sup>
- In **Idaho**, EPA stated in its 2015 comment letter to the state: "Many areas where reserved rights are exercised cannot be directly protected or regulated by the tribal governments and, therefore, the responsibility falls to the state and federal governments to ensure their protection. In order to effectuate and harmonize these reserved rights with the CWA, such rights appropriately must be considered when determining which criteria are necessary to adequately protect Idaho's waters used for consumption of fish (designated as Primary or Secondary Contact Recreation, IDAPA 58.01.02.100.02(a)&(b))."
- In a January 2017 letter to the state, EPA stated that "[i]n Idaho, as in Washington, tribes hold reserved rights to take fish for subsistence-as well as ceremonial, religious, and commercial-purposes, including the treaty-reserved right to take fish at all usual and accustomed fishing places. Similar to the EPA's action on human health criteria for Washington and its discussion of treaty-reserved rights, in order to effectuate these rights in harmony with the CWA, Idaho's fishing uses should be interpreted to include a subsistence fishing component."

- **CRITERIA**

- CWA section 303(c)(2)(A) provides that standards include water quality criteria "based upon [designated] uses." EPA's regulations provide that states "must adopt those water quality criteria that protect the designated use. Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use." 40 CFR 131.11(a)(1).
- EPA's 2000 Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health includes a section providing guidance on "Identifying the Population Subgroup that the [Criteria] Should Protect." That section explains that an "important decision to make when setting [criteria] is the choice of the particular population to protect. For instance, criteria could be set to protect those individuals who

<sup>11</sup> February 2, 2015 decision at 30-31.

<sup>12</sup> *Id.* at 31-32.

<sup>13</sup> 81 Fed. Reg. 85417, 85423 (Nov. 28, 2016).

are the average or ‘typical’ exposures, or the criteria could be set so that they offer greater protection to those individuals who are more highly exposed.” Methodology at 2-1.

- The Methodology discusses that EPA’s recommended criteria are derived to “afford an overall level of protection targeted at the high end (e.g., percentile estimates) of the general population (i.e., the target population or the criteria-basis population)” and that EPA considers that its target protection goal is satisfied if the population as a whole will be adequately protected” by the criteria. The guidance further states that “EPA also strongly believes that States and authorized Tribes should have the flexibility to develop criteria, on a site-specific basis, that provide additional protection appropriate for highly exposed populations.” Id. at 2-2.

- **CRITERIA: TARGET POPULATION**

- In its actions in Maine and Washington, EPA determined that the “target” population for the derivation of the HHC in waters with tribal reserved fishing rights would be the individuals with those rights.
- In **Maine**, EPA concluded in its 2015 decision disapproving Maine’s HHC, that “when analyzing how the WQS program applies to the sustenance fishing use in the waters in Indian lands in Maine, the tribal population must be considered the ‘target population’ for the purpose of determining whether the State’s human health criteria are adequate to protect the tribes’ health.”<sup>14</sup> Maine’s HHC were based on the general population as the target population.
- In the preamble to its final 2016 rule, EPA explained that “the tribes are not a highly exposed or high-consuming subpopulation in their own lands; they are the general population for which the federal set-aside of these lands and their waters was designed.”<sup>15</sup>
- In **Washington**, EPA explained in its 2015 proposal that in order to “effectuate reserved fishing rights, including the rights in federal treaties afforded to tribes in Washington,” EPA proposed to derive criteria to protect the tribes’ reserved fishing rights by “treating the tribal population exercising those rights as the target general population.”<sup>16</sup>
- In responding the public comments in the preamble to the final rule, EPA explained that its conclusion to identify tribes as the target population was based on EPA’s CWA implementing regulations “requiring criteria support the most sensitive use (*i.e.*, subsistence fishing) and EPA’s 2000 Methodology recommendation that “priority be given to identifying and protecting highly exposed populations.”<sup>17</sup>
- EPA concluded that “it is reasonable and appropriate to identify tribes as the target *general* population for protection, rather than a subpopulation” and apply the 2000 Methodology recommendations on exposure for the general population to the tribal target populations.
- Note: This was not a determinative issue in EPA’s Nov. 15, 2016 disapproval of Washington’s HHC. While Washington disagreed with EPA that the tribes should be treated as the target population, the state did account for tribal fish consumption in

<sup>14</sup> February 2, 2015 Decision at 35.

<sup>15</sup> 81 Fed. Reg. 92466, 92480 (Dec. 19, 2016).

<sup>16</sup> 80 Fed. Reg. at 55068 (Sept. 14, 2015).

<sup>17</sup> 81 Fed. Reg. at 85424 (Nov. 28, 2016).

- selecting its fish consumption rate (175 g/day – the same FCR used by EPA).
- In **Idaho**, EPA noted in a 2015 comment letter, “Protecting Idaho's fishing designated uses necessitates protecting the population exercising those uses. Where a population exercising such uses has a legally protected right to do so under federal law such as a treaty, the criteria protecting such uses must be consistent with such right. Thus, in order to protect the applicable fishing designated uses in areas where such rights apply, as informed by the treaty-reserved right to continue legally protected culturally important subsistence fishing practices, the state must consider the tribal population exercising their reserved fishing rights in Idaho as the target general population for the purposes of deriving criteria that will protect the subsistence fishing use and allow the tribes to harvest and consume fish consistent with their reserved rights.”
- Idaho responded in its December 2015 response to comments document on its proposed rule that it disagrees that the tribal population should be treated as the target general population.
- EPA concluded in its January 2017 letter that Idaho did not adequately consider tribal treaty rights when deriving its HHC, in part because the State failed to treat the tribal population as the target general population.
- **CRITERIA: FISH CONSUMPTION RATE (FCR)**
  - A key exposure factor in deriving HHC is the FCR. EPA’s 2000 Methodology sets forth EPA recommended four-preference hierarchy for FCR data: (1) use of local data; (2) use of data reflecting similar geography/population groups; (3) use of data from national surveys; and (4) use of EPA’s default FCRs (e.g., 22 g/day for the general population; 142 g/day for subsistence fishers).<sup>18</sup>
  - In 2013, EPA issued guidance recommending taking into account the potential suppression effects that occur when consumption rates are diminished due to perceptions of pollutant contamination of the fish.<sup>19</sup>
  - In **Maine**, EPA disapproved Maine’s HHC as not being protective of a sustenance fishing use in the waters in Indian lands. EPA concluded that Maine’s 32.4 g/day FCR was not representative of an unsuppressed sustenance FCR by tribal members in waters in Indian lands. EPA explained that to remedy its disapproval Maine could develop revised HHC for waters in Indian lands protecting tribal sustenance fishers as the target general population and are based on a FCR that represents unsuppressed sustenance fishing by tribal members.<sup>20</sup>
  - In proposing and promulgating HHC for Indian lands in Maine, EPA used 286 g/day FCR to derive the HHC. EPA selected the FCR based on information contained in an historical/anthropological study, entitled the Wabanaki Cultural Lifeways Exposure Scenario which was completed in 2009. EPA also consulted with the tribes in Maine. In the absence of any contemporary local survey of current fish consumption, adjusted to account for suppression, that documents fish consumption rates for sustenance fishing in waters in Indian lands, EPA concluded the Wabanaki Study contained the best currently available information for deriving a FCR.

<sup>18</sup> 2000 Methodology at 4-25.

<sup>19</sup> EPA 2013, Human Health Ambient Water Quality Criteria and Fish Consumption Rates: Frequently Asked Questions, page 2.

<sup>20</sup> February 2, 2015 Decision at 41-42.

- In **Washington**, EPA uses a FCR of 175 g/day in deriving HHC. Washington Ecology also used 175 g/day in deriving the state's HHC. The FCR was first used by Oregon in adopting HHC which EPA approved in 2011.
- EPA's disapproval of Washington Ecology's HHC was not based on FCR but rather on Ecology's failure to use current bioaccumulation factors and relative source contribution information.
- In **Idaho**, the State used a FCR of 66.5 g/day in deriving HHC. Idaho's selected FCR is based on the mean of data from a local tribal survey, rather than the upper percentiles (159.4 g/day for 90th, and 233.9 for 95th). The survey data does not account for suppression effects (there are numerous fish advisories in Idaho recommending limited consumption), and thus, in its January 2017 letter to Idaho, EPA recommended using a higher FCR (especially given the downgraded cancer risk level, described below). In that letter, EPA explained that the use of the mean, EPA's lowest recommended value, coupled with the lowest recommended cancer risk, leaves little to no room to consider and account for suppression.
- **CRITERIA: CANCER RISK LEVEL (CRL)**
  - Selecting a CRL is one component in deriving HHC for carcinogens. EPA's 2000 Methodology states that EPA intends to use the 10<sup>-6</sup> risk level as "an appropriate risk for the general population." The guidance, however, also says that "EPA believes that both 10<sup>-6</sup> and 10<sup>-5</sup> may be acceptable for the general population and that highly exposed populations should not exceed 10<sup>-4</sup> risk level."
  - The guidance continues by saying that adoption of a 10<sup>-6</sup> or 10<sup>-5</sup> risk level, "both of which States and authorized Tribes have chosen in adopting water quality standards to date, represents a generally acceptable risk management decision, and EPA intends to continue providing flexibility to States and Tribes. EPA believes that such State and Tribal decisions are consistent with Section 303(c) if the State or authorized Tribe has identified the most highly exposed subpopulations, has demonstrated that the chosen risk level is adequately protective of the most highly exposed subpopulations, and has completed all necessary public participation."<sup>21</sup>
  - In **Maine**, the state DEP's WQS regulations specify that criteria for carcinogens must be based on a CRL of 10<sup>-6</sup>. In its February 2, 2015 decision, EPA approved the 10<sup>-6</sup> CRL for waters in Indian lands.
  - In **Washington**, the State adopted criteria using a 10<sup>-6</sup> CRL so this was not an issue in EPA's disapproval of Washington's criteria.
  - In **Idaho**, the State made a late change from its longstanding CRL of 10<sup>-6</sup> to 10<sup>-5</sup>. In its January 2017 letter, EPA raised concerns that a 10<sup>-5</sup> cancer risk level would not be sufficiently protective, given Idaho tribes' treaty rights and the need to harmonize the CWA with those rights.
  - EPA's January 2017 letter also noted that Idaho's change to its CRL resulted in one third of the 2016 criteria being less protective than the 2006 criteria that EPA disapproved in 2012.
  - Idaho's change in its CRL was also not clearly indicated during the rulemaking process, and thus was not subject to public comment.

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<sup>21</sup> EPA 2000 Methodology at 2-6 – 2-7.



**STATUS OF WQS MATTERS IN ME, WA, AND ID**

• **MAINE:**

- On February 16, 2018, the State of Maine filed its principal brief in its case challenging EPA's February 2015 decisions on Maine's WQS.
- EPA's principal brief is due June 21, 2018.
- In March and May of 2017 respectively, the State of Maine and a group of dischargers requested that EPA reconsider and reverse its decisions at issue in the litigation and withdraw its federal promulgation. EPA agreed to reconsider the decisions. EPA thus sought and received two consecutive stays from the court in order to conduct this reconsideration, lasting from May to December of 2017. During this period, EPA attempted to engage in mediation with Maine and the two tribes that are parties to the litigation, the Penobscot Nation and Houlton Band of Maliseets. Although the tribes indicated a willingness to do so, Maine declined.
- In December 2017, EPA completed its reconsideration with the Administrator's decision not to revise any of the decisions at issue. On December 8, 2017, EPA informed the court of this decision.
- EPA's federally promulgated WQS are currently in effect in tribal waters.

• **WASHINGTON:**

- In November 2016, EPA approved and disapproved certain HHC submitted by WA. WA's selected FCR and CRL were protective of tribal subsistence fish consumers; EPA disapproved where WA's HHC were not based on sound science to protect the designated use. EPA promulgated federal HHC in place of the disapproved state HHC.
- In February 2017, several industry groups submitted a petition requesting that EPA reconsider its action on the state HHC and repeal the federal HHC rule. Tribes and environmental groups sent letters in 2017 asking EPA to deny the industry petition.

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**Ex.5 DPP / ACP / AWP**

• **IDAHO:**

- EPA is reviewing ID's HHC, which were submitted on December 13, 2016. ID's HHC are based on current science but use a lower FCR and CRL than EPA used in its federal promulgations in ME and WA.
- The CWA deadlines to either approve or disapprove ID's criteria have passed. EPA is under a settlement agreement with the Idaho Conservation League (ICL) to either approve ID's HHC or sign a notice of proposed federal rulemaking for ID by June 13, 2017. ICL stated its intent not to press EPA to comply with the agreement "for the foreseeable future."
- EPA previously expressed concern that ID's HHC are not protective of tribal members exercising treaty-reserved fishing rights and do not ensure protection of downstream waters in WA and OR.

- EPA is engaged in government-to-government consultation with the ID tribes on EPA's review. The tribes have asked that EPA continue to offer consultation and coordination meetings prior to any final EPA decision.